United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

24-4

11

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 24,052

WILLIE MAE MITCHELL,

Appellant,

v.

ELMER D. WOODWORTH, Deputy Commissioner,
Bureau of Employees' Compensation,
U. S. Department of Labor,
District of Columbia Compensation District,

STEINER CONSTRUCTION COMPANY, INC.,

AETNA CASUALTY AND SURETY COMPANY,

Appellees.

APPEAL IN FORMA PAUPERIS FROM JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA GRANTING SUMMARY JUDGMENT FOR APPELLEES AND DISMISSING APPELLANT'S ACTION FOR WORKMEN'S COMPENSATION DEATH BENEFITS, AND FROM THE JUDGMENT ORDER DENYING APPELLANT'S MOTION TO REHEAR DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND TO ALTER OR AMEND THE SUMMARY JUDGMENT FOR APPELLEES AGAINST APPELLANT AND DISMISSING APPELLANT'S ACTION TO JUDGMENT FOR APPELLANT AGAINST APPELLEES.

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TABLE OF CASES

Appellant-widow relies greatly on the cases marked with an asterisk (*).

STatutes Cited

This case has never previously been before this Court in any form.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Section 1291, Title 28, U.S.C., as amended, final decisions having been made by the District Court's summary judgment order dated December 11, 1969, for appellee-defendants and dismissing appellant-plaintiff's action herein, and by the District Court's judgment order dated January 23, 1970, denying appellant-plaintiff's motion to rehear and to alter or amend said summary judgment to judgment for appellant-plaintiff.

The District Court had jurisdiction under and pursuant to the provisions of Section 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 921, made applicable to the District of Columbia by Section 36-501, D. C. Code, 1967 Edition, to set aside an order denying workmen's compensation death benefits if not in accordance with law.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

1. Did Deceased Employee Herman Mitchell's injury and collapse at his work on November 17, 1966, while he was suffering from high blood pressure and hypertension, and while carrying heavy building blocks two at a time, each weighing about twenty-five (25) pounds, and lifting them up and on to a scaffold, and his death later in the same day, from a cerebral vascular accident, arise out of and in the course of his employment, and under the workmen's compensation act's statutory presumption of compensability provide his appellant-widow with a just claim to death benefits compensation?

2. Does the opinion testimony of appellees' doctors, who testi-

fied only from five pieces of paper and who never saw the deceased employee-husband of appellant-widow dead or alive, constitute the "substantial evidence" required by the Act to overcome the statutory presumption that appellant-widow's claim is within the provisions of the Act and compensable, in view of thefact that their cross-examination admitted and shows that the deceased employee-husband's work of carrying and lifting heavy building blocks could have aggravated his pre-existing high blood pressure and hypertension, and thuse have caused his collapse at his work and his death the same day?

3. Did the District Court and Appellee Deputy Commissioner ignore, and fail and refuse to give effect to, the presumption of compensability of appellant-widow provided by Section 20 of the Act (33 U.S.C. 920) that "it shall be presumed, in the absence of substantial evidence to the contrary . . . That the claim comes within the provisions of" the Act?

4. Is there any evidence in the record that Deceased Employee Mitchell's collapse at his work and death the same day was caused by anything other than the effect and result of his heavy building block lifting work on his body which included his high blood pressure and hypertension?

5. Is it not factual that there is no substantial evidence in the record that the collapse and death of Deceased Employee Mitchell were due to any cause other than his work and its effect upon his physical condition impaired by his high blood pressure and hypertension, the condition in which Appellee-Employer Steiner Construction Company accepted and employed him?

6. Are the judgments of the District Court against appellant-

widow's claim and affirming and upholding the Deputy Commissioner's rejection thereof contrary to the law and the evidence.

STATEMENT OF THE CASE.

(Note: Inasmuch as the record is short and Appellant-widow Willie Mae Mitchell is proceeding in forma pauperis and is unable to pay the expenses of this appeal, inasmuch as she exists on $77.10 per month from Social Security and Welfare payments, and her counsel are paying for her brief, references are to the record itself without a separate appendix. See appellant's affidavit of February 12, 1970, filed February 13th, in support of her motion for leave to appeal in forma pauperis.)

It is undisputed that Appellant-widow-claimant Willie Mae Mitchell is the wife and widow of Deceased Employee Herman Mitchell (R., 13). It is not disputed that Employee Mitchell was enployed as a laborer by Appellee Steiner Construction Company, Inc., the workmen's compensation liability of which is insured by Appellee Aetna Casualty and Surety Company, and that Employee Mitchell collapsed while at his employment and work carrying building blocks two at a time, each weighing about twenty-five (25) pounds and lifting them to a scaffold on November 17, 1966, was taken to Casualty Hospital, and died there in the evening of the same day, caused by a cerebral vascular accident, secondary to introventricular and introcerebral hemorrhage.

The principal issue is whether or not Employee Mitchell's injury, collapse and death arose out of and in the course of his said employment with the result that his appellant-widow is entitled to workmen's compensation death benefits in accordance with the statutory presumption of compensability, or whether or not his collapse at his work and death the same day were unconnected with his said employment and work.

It will be abundantly clear upon an objective reading of the whole record that the District Court and the Deputy Commissioner acted erroneously in that they did not construe the workmen's compensation

act favorably to the employee and his dependent appellant-widow, and did not resolve doubts, including the factual, in her favor, as the law requires.

It is legal fact that "Employers accept with their employees the frailties that predispose them to bodily hurt." A doctor of medicine, the only medical witness who had seen, examined and treated Employee Herman Mitchell in September, 1966, prior to his death November 17, 1966, testified that he had high blood pressure and hypertension, that his laboring work was probably related to his death, that his laboring work could have aggravated his physical condition and produced the cerebral vascular accident he suffered and sustained while doing his heavy building block carrying work, which cerebral vascular accident resulted in his death. See Transcript Pages 97, 102, 103, 104, 105 and 109.

Decedent was engaged in light work the day before his death, and had no complaints according to a fellow worker (R., 76), and his sister (R., 23). On the moring of November 17, 1966, when he left for work, he had no complaints (R., 14). When he arrived at work about 7:30 A. M. he was assigned to carrying twenty-five (25) pound cinder blocks, two at a time, one in each hand, a distance of about twenty-five (25) feet to a scaffold where where he lifted them up for the brickmasons (R., 75). He had high blood pressure (R., 19, 20). About 9 A. M. he was seen by the work superintendent sliding down into a sitting position against a wall (R., 75-77), and he appeared to be ill (R., 75). An ambulance was called and he was taken to Casualty Hospital, where it was found that his blood pressure was 240 over 120 (R., 33, 62). He died that evening (November 17, 1966, R., 16-17). The Coroner, upon autopsy, found that he died from a cerebral vascular accident,

secondary to an introcerebral hemorrhage and an introventricular hemorrhage (R., 73).

Appellant submits that upon the above facts her employee-husband suffered accidental injry while actually at his work for Appellee-employer Steiner Construction Company, and that she is entitled as the deceased employee's widow to workmen's compensation death benefits under Section 20 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 920, which provides:

> "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary-- That the claim comes within the provisions of this chapter." (Emphasis supplied.)

Appellant-widow submits that nowhere in the record is this presumption overcome by substantial evidence.

Appellee employer and insurance carrier elected to defend upon medical opinion testimony, and attempted to prove by two doctors that Employee Mitchell's work had nothing to do with his death. On cross-examination, both doctors admitted that the employee's physical condition of high blood pressure and hypertension could be aggravated by his work (R., 36-37, and 53), and that they never saw the employee dead or alive (R., 34, 52). All that they knew about the case was based on five pieces of paper, three statements, certificate of death, and a coroner's report (R., 27A, 29, 39, 44, 52), which are parts of the record (R., 72-77), but which do not contain or set out sufficient factual details essential to forming a reasonable and definite medical opinion based on facts.

Appellant-widow offered the only medical witness who had seen, examined and treated the deceased employee, as above stated. Appellant' medical witness testified also that hurrying, overexertion and activity

Employee Herman Mitchell (R., 109).

Appellant-widow submits that the cross-exmination of appellee's two medical witnesses and their admissions therein destroyed any substantiality of their opinion testimony, and that the District Court and the Deputy Commissioner ignored and failed to give effect to the rules of law that the act is to be liberally construed in favor of the employee and his dependents, and that doubts, including the factual, are to be resolved in favor of the employee and his dependents. Appellant-widow further submits that her right to compensation is clear, and that at its worst her claim to compensation is only doubtful, and is not clearly without legal basis. Consequently upon such leberal construction and resolution of doubts in her favor appellant-widow is entitled to compensation.

SUMMARY OF ARGUMENT.

Appellee-employer Steiner Construction Company, Inc., in employing Deceased Employee Herman Mitchell, accepted with him his frailties that predisposed him to bodily hurt.

Deceased Employee Mitchell's injury, collapse and death arose out of and in the course of his employment and work.

Thereupon, the law -- statutory and case -- makes his injury, collapse death compensable in favor of his Appellant-Widow Willie Mae Mitchell.

There is no "substantial evidence" in the record overcoming the statutory presumption and the case law that appellant-widow's claim comes within the Act and is compensable.

The District Court and the Deputy Commissioner erred in that they ignored and failed to give effect to the rules of law that the Act is to be construed liberally in favor of, and doubts are to be resolved

in favor of, the employee and his dependents.

If the statutory presumption of compensability and the decided case have any present effectiveness, meaning and weight appellant-widow is entitled to workmen's compensation death benefits, and the judgments below should be reversed and the Deputy Commissioner ordered to award such death benefits to appellant-widow.

ARGUMENT.

I.

APPELLEE-EMPLOYER STEINER CONSTRUCTION COMPANY, INC., IN EMPLOYING DECEASED EMPLOYEE HERMAN MITCHELL, ACCEPTED HIM WITH HIS FRAILTIES THAT PREDISPOSED HIM TO BODILY HURT.

"Employers accept with their employees the frailties that predispose them to bodily hurt." *Vozzolo, Inc., v. Britton, Dep. Comr., USCtAppDCCir 1966, 126 USAppDC 259, 2620263, 377 F2d 144.

The employer here accepted Deceased Employee Herman Mitchell with his high blood pressure and hypertension that predisposed him to the bodily hurt he received November 17, 1966, when he was assigned and called upon to lift, carry and lift up to a scaffold two building blocks at a time, each weighing about twenty-five pounds, namely: a cerebral vascular accident, secondary to introventricular and introcerebral hemorrhage.

II.

DECEASED EMPLOYEE HERMAN MITCHELL'S INJURY, COLLAPSE AND DEATH AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

Leaving out the speculations of the employer's two doctor witnesses by their opinions, which are not "substantial evidence," as hereinafter shown, there is no evidence or testimony in the record that the employee's injury, collapse and death were due to any cause other than the cerebral vascular accident he suffered as result of the strain of his

employment or work of lifting, carrying and lifting to a scaffold twenty-five/pound building blocks, two at a time.

The doctor of medicine/who saw, examined and treated Employee Mitchell in September, 1966, prior to his death November 17, 1966, the only medical witness in this case who ever saw Employee Mitchell dead or alive, testified that he had high blood pressure and hypertension (R., 97), that his work could have caused an internal hemmorrhage (R., 102), that even someone screaming could have caused a vascular accident (R., 103), and that his work could have aggravated his condition and could have been an inciting factor in his injury, collapse and death (R., 105)

It is beyond doubt that Deceased Employee Mitchell was actually at his work for Appellee-Employer Steiner Construction Company, Inc., when his injury and collapse occurred from a cerebral vascular accient, secondary to introventricular and introcerebral hemorrhage.

Therefore, unless there is "substantial evidence to the contrary," it is beyond doubt that decedent's injury, collapse and death arose out of and in the course of his employment, and appellant-widow's claim to workmen's compensation death benefits is compensable, in accordance with the statutory presumption.

III.

THE ACT'S STATUTORY PRESUMPTION THAT APPELLANT-WIDOW'S CLAIM COMES WITHIN THE ACT AND IS COMPENSABLE PREVAILS HERE UNLESS THERE IS "SUBSTANTIAL EVIDENCE TO THE CONTRARY."

In this case the statutory presumption "That the claim comes within the provisions of the" Act applies, and carries the results that Deceased Employee Mitchell's injury, collapse and death atose out of and in the course of his employment, and that appellant-widow's claim to workmen's compensation death benefits is compensable.

The following quotations from *Robinson v. Bradshaw, USCtAppDC Cir 1953, 206 F2d 435, 92 USAppDC 216, 219, 200, apply in this case:

> " . . . the statutory presumption brings the death within the act when it results in the course of employment from an illness which has taken a sudden and unusual turn for the worse, not shown by substantial evidence to be unrelated to the employment."
>
> " . . . There was no substantial evidence that such aggravation was not due to the employment, and since, also, it occurred in its course it must be presumed to have arisen therefrom."

The great effectiveness and wide range of the statutory presumption of compensability shown by *Robinson above is further illustrated by *Wheatley v. Adler, USCtAppDCCir 1968, 407 F2d 307, 132 USAppDC 177, where the deceased employee left his actual work to relieve himself and collapsed on his way back from a toilet in chilly weather, and died, and his death was held compensable.

IV.

APPELLEE EMPLOYER AND INSURANCE CARRIER DID NOT INTRODUCE ANY "SUBSTANTIAL EVIDENCE TO THE CONTRARY" OF THE STATUTORY PRESUMPTION OF COMPENSABILITY, AND THE DISTRICT COURT AND THE DEPUTY COMMISSIONER ERRED IN HOLDING OTHERWISE.

The only, but unsubstantial, evidence against compensability in the record, is the opinion testimony of Dr. Jack Philip Segal and Dr. Norman M. Horwitz, who were witnesses for the employer, Appellee Steiner Construction Company, Inc., and its insurance carrier, Appellee Aetna Casualty and Surety Company, who never saw Deceased Employee Mitchell dead or alive, and who testified to their opinions upon five pieces of paper and very indefinite facts. Dr. Segal, Tr., 31, testified indefinitely and vaguely that

> "I do not feel that the amount of effort that he was exerting at his work is in any way related to his cerebrovascular hemorrhage."

Dr. Horwitz, Tr., 48, testified indefinitely and vaguely that

" . . . I conclude that this is a spontaneous event related to sclerotic disease in one of the cerebral vessels in association with a background of high blood pressure."

and testified further (Tr., 51)

"It is reasonably probable that this was a spontaneous event unrelated to any activity being performed by the individual."

Appellant-widow submits that they did not give any stronger or more substantial testimony elsewhere in the record, and that such indefinite and vague guesses are not the "substantial evidence" required to overcome the statutory presumption of compensability.

If such indefinite and vague opinion statements are "substantial evidence to the contrary" of the statutory presumption of compensability appellant-widow submits that the Act's statutory presumption is ineffective and meaningless, and that this Court's decisions and opinions are too easily overcome.

Furthermore, the unsubstantial and vague opinions of Drs. Segal and Horwitz that it was only a feeling and medical probability that Deceased Employee Mitchell's cerebral vascular accident was not connected with or related to his employment were negated, and overcome, by their admissions on cross-examination that Employee Mitchell's high blood pressure and hypertension could have been aggravated by his laboring work of carrying and lifting building blocks weighing about twenty-five pounds each, two at a time, and their uncertainty as to the facts of details of the employee's work. Their admissions on cross-examination that Employee Mitchell's pre-existing high blood pressure and hypertension could have been aggravated by his said laboring work bring into operation the rule of law that aggravation of a pre-existing condition which results in injury is to cause the injury.

See: *Wheatley v. Adler, USCtAppDCCir 1968, 407 F2d 307, 132 USAppDC 1
*Howell v. Einbinder, USCtAppDCCir 1965, 350 F2d 442, 121 USAppDC

Appellant-widow submits that the evidence shows that her employee-husbands cerebral vascular accident while he was actually at his work covered by workmen's compensation hastened his death. "To hasten death is to cause it." *Friend v. Britton, USCtAppDCCir 1955, 220 F2d 820, 95 USAppDC 139, p. 144.

*Steele v. Adler, USDCDC 1967, 269 F. Supp 376, at 378-9, a Compensation Act death case, holds that such opinion testimony as was given by Drs. Segal and Horwitz is not substantial evidence. The opinion contains the following:

> " . . . On the basis of that testimony (opinion of a medical witness), the Deputy Commissioner found that the cause of the embolus which was the proximate cause of the death of William O. Steele was the subtotal gastectomy, which was necessitated by Steele's ulcer, which in turn was caused by Steele's drinking, and that therefore his death was not the result of a work-related injury.
>
> "I hold first that this conclusion is in error as a matter of law. Reliance on mere hypothetical probability in rejecting a claim is contrary to the presumption created by the Act that [Section 20, Title 33 U.S.C. 920, quoted], What the act calls for is facts not speculation to overcome the presumption of compensability."

Drs. Segal and Horwitz only testified to to their views of medical probability, and such speculations are not the "substantial evidence" that overcomes the statutory presumption. Said statutory presumption clearly was designed to prevent medical speculations from being used to deny compensability.

As to what constitutes "substantial evidence to the contrary" of the statutory presumption of compensabiility see also

> *Wheatley v. Adler, USCtAppDCCir 1968, 407 F2d 307, 132 US AppDC 177.
> *Robinson v. Bradshaw, USCtAppDCCir 1955, 206 F2d 435, 92 USAppDC 216.

Appellant-widow submits that the opinion evidence of Drs. Segal and Horwitz is not "substantial evidence to the contrary" of the

statutory presumption that her claim is compensable, and that the District Court and the Deputy Commissioner erred in denying appellant-widow workmen's compensation death benefits upon such opinion speculations as to the cause of Employee Mitchell's death.

V.

THE RULES OF LAW THAT THE ACT SHOULD BE CONSTRUED LIBERALLY IN FAVOR OF EMPLOYEES AND THEIR DEPENDENTS, AND THAT DOUBTS, INCLUDING THE FACTUAL, ARE TO BE RESOLVED IN THEIR FAVOR WERE NOT FOLLOWED BUT IGNORED BY THE DISTRICT COURT AND THE DEPUTY COMMISSIONER.

Appellant-widow submits that it is a rule of law that the Act should be construed liberally in favor of employees and their dependents, and a further rule of law that it is in favor of employees and their dependents that doubts, including the factual, are to be resolved.

*Wheatley v. Adler, USCtAppDCCir 1968, 407 F2d 307, 132 U. S. AppDC 177, and other decisions of this Circuit as follows:
*Vozzolo, Inc., v. Britton, 1967, 377 F2d 144, 126 USAppDC 259.
Butler v. District Parking Management Co., 1966, 363 F2d 682, 124 USAppDC 195.
Howell v. Einbinder, 1965, 350 F2d 442, 121 USAppDC 312.
Hancock v. Einbinder, 1962, 310 F2d 872, 114 USAppDC 67.
*Friend v. Britton, 1955, 220 F2d 820, 95 USAppDC 139.
*Robinson v. Bradshaw, 1953, 206 F2d 435, 92 USAppDC 216.

Appellant-widow submits that if her right to compensation is considered not clear, it is at worst doubtful that she should be denied compensation, and that if her right to claim compensation is doubtful, in view of the conflicts in the evidence, the District Court and the Deputy Commissioner erred in failing, neglecting and refusing to construe the Act liberally in her favor, and to resolve doubts, including the factual, in her favor and to grant her workmen's compensation death benefits on the death of her deceased employee-husband.

Appellant-widow submits that liberal construction of the Act in her favor and resolution in her favor of doubts, including the factual,

would have resulted in judgment by the District Court that the Deputy Commissioner had erroneously and unlawfully denied appellant-widow's claim to workmen's compensation death benefits.

Appellant-widow submits that the District Court erred in failing, neglecting and refusing to construe the Act liberally in her favor and to resolve doubts, including the factual, in her favor, and therefore should be reversed.

CONCLUSION.

Appellant-Widow Willie Mae Mitchell submits that if the statutory presumption of compensability and the decided cases implementing that presumption have any present effectiveness, meaning and weight she is legally entitled to workmen's compensation death benefits upon the death of her husband arising out of and in the course of his employment, and that the judgments below should be reversed and the District Court and the Deputy Commissioner ordered to award workmen's compensation death benefits to appellant-widow.

Respectfully submitted,

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BRIEF FOR THE APPELLEES, STEINER CONSTRUCTION COMPANY, INC. AND AETNA CASUALTY & SURETY COMPANY

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,052

WILLIE MAE MITCHELL, *Appellant*

v.

ELMER D. WOODWORTH, *Appellee*

and

STEINER CONSTRUCTION COMPANY, INC. AND AETNA CASUALTY & SURETY CO., *Intervening Appellees*

Appeal From the United States District Court for the District of Columbia

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CITATIONS

CASES:

* Cases chiefly relied upon are marked with an asterisk.

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STATEMENT OF ISSUES

The sole issue presented in this proceeding is whether the record, considered as a whole, supports the finding of the Deputy Commissioner that the deceased employee did not sustain an employment related injury and consequent death arising out of and in the course of employment.

This case has not been before this court previously.

References and Rulings—None

IN THE

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No. 24,052

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Appeal From the United States District Court for the District of Columbia

---

BRIEF FOR THE APPELLEES, STEINER CONSTRUCTION COMPANY, INC. AND AETNA CASUALTY & SURETY COMPANY

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the District of Columbia.

This cause arose upon an action instituted by the appellant, Willie Mae Mitchell, to review and set aside as not in accordance with law a compensation order filed by Elmer D. Woodworth, Deputy Commissioner, Bureau of

Employees' Compensation, United States Department of Labor, on October 4, 1968, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901 et seq., and as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D.C. Code 36-501. In that order the workmen's compensation claim of the appellant, Willie Mae Mitchell, filed on behalf of herself as the surviving wife of Herman Mitchell, deceased employee, was rejected by the Deputy Commissioner for the reason that the death of the employee was found not to have been related to the deceased's employment, i.e., death did not arise out of and in the course of that employment.

Following rejection, a complaint was filed in the Court below, which, in effect, took issue with the foregoing finding. Thereafter the Deputy Commissioner and the intervening defendants, Steiner Construction Company, Inc., and the Aetna Casualty and Surety Company, filed motions for summary judgment which the Court below granted, dismissing the action. A subsequent application for rehearing filed by plaintiff-appellant was denied, and this appeal followed.

SUMMARY OF THE ARGUMENT

It is well settled that findings of the Deputy Commissioner under the Longshoremen's Act must be accepted by a reviewing court if they are supported by substantial evidence and in accordance with law; *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504 (1951); *Cardillo* v. *Liberty Mutual Co.,* 330 U.S. 469 (1947); *Del Vecchio* v. *Bowers,* 296 U.S. (1935); *Voehl* v. *Indemnity Insurance Co. of N.A.,* 288 U.S. 162 (1933); *United Painters & Decorators* v. *Britton,* 112 U.S. App. D.C. 236, 301 F. 2d 560 (1962); *Phoenix Assurance Co. of N. Y.* v. *Britton,* 110 U.S. App. D.C. 118, 289 F. 2d 784 (1961); or are not irrational, *O'Keefe* v. *Smith, Hinchman & Grylls,* 380 U.S. 359 (1965). A review of the record in this case demonstrates very clearly

that there was an abundance of evidence before the Deputy Commissioner upon which he could base his findings of fact that the injury and consequent death of the deceased employee did not arise out of and in the course of the employment. The Deputy Commissioner's award is clearly correct and there is no proper basis in law sufficient to overrule the action of the District Court in granting the motions for summary judgment of the appellees.

ARGUMENT

Scope of Review

The scope of judicial review in cases such as the one at bar is set forth in *O'Leary* v. *Brown-Pacific-Maxon*, supra, in which the Supreme Court said:

> . . . The standard, therefore, is that discussed in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S. Ct. 456. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole . . .
>
> . . . We do not mean that the evidence compelled this inference; we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion . . .

Similarly with reference to the inferences drawn by a Deputy Commissioner, the Supreme Court in *Cardillo* v. *Liberty Mutual Insurance Co., supra,* said:

> In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury

> did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable.
>
> . . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court.

In short, where the Deputy Commissioner's compensation order has support of substantial record evidence it can be set aside only for an error of law, "such as a misconstruction of the Act." *Voris* v. *Eikel*, 346 U.S. 328 (1953).

And in language even more restrictive, the Supreme Court in *O'Keefe* v. *Smith, Hinchman & Grylls, supra*, has added:

> The rule of judicial review has therefore emerged that the inferences drawn by the Deputy Commissioner are to be accepted unless they are irrational or "unsupported by substantial evidences on the record as a whole. . ."
>
> We agree that the District Court correctly affirmed the finding of the Deputy Commissioner. While this Court may not have reached the same conclusion as the Deputy Commissioner, it cannot be said that his holding . . . is irrational or without substantial evidence on the record as a whole.

Or as stated by the Court in the case of *Groom* v. *Cardillo*, 73 App. D.C. 358, 119 F. 2d 297 (1941):

> It is of no consequence that we might have reached a different conclusion or that there is a sharp conflict in the testimony or even that the evidence preponderates strongly against the view expressed by the Deputy. We cannot substitute our judgment for the Deputy's judgment, nor can we weigh the evidence.

In the instant case, the Deputy Commissioner's findings are similarly binding. Under such interpretations of the Longshoremen's Act by the Supreme Court of the United States, as well as by the Court of Appeals for the District of Columbia, *Phoenix Assurance Company,* v. *Britton, supra; General Accident, Fire & Life Assurance Corporation* v. *Britton,* 103 U.S. App. D.C. 135, 255 F. 2d 544 (1958); *Liberty Mutual Insurance Co.* v. *Britton,* 100 U.S. App. D.C. 236, 243 F. 2d 659 (1957); *United States Fidelity & Guaranty Co* v. *Britton,* 88 U.S. App. D.C. 293, 188 F. 2d 674 (1951), a court may not set aside a compensation order unless, on the whole record, the court believes that the Deputy Commissioner was "compelled" to make findings, draw inferences and arrive at conclusions different from those set forth in the compensation order complained of.

Accordingly, logical deductions and inferences which are drawn by the Deputy Commissioner from the evidence should be taken as established facts and are not judicially reviewable. *O'Leary* v. *Brown-Pacific-Maxon, Inc., supra; Del Vecchio* v. *Bowers, supra; Wolff* v. *Britton,* 117 U.S. App. D.C. 209, 328 F. 2d 181 (1964); *Crescent Wharf & Warehouse Company* v. *Cyr,* 200 F. 2d 633 (C.A. 9, 1952); *Southern Stevedoring Co.* v. *Henderson,* 175 F. 2d 863 (C.A. 5, 1949). The burden is on the plaintiff to show that the evidence before the Deputy Commissioner does not support the compensation order complained of in the review proceeding. *Southern Stevedoring Co.* v. *Henderson, supra; Gulf Oil Corporation* v. *McManigal,* 49 F. Supp. 75 (W. Va. 1943).

The Evidence

The record in the instant case consists of the typewritten transcript of the administrative hearing held before the Deputy Commissioner on May 17, and September 6, 1968, with exhibits. The transcript of the aforesaid hearing contains the following facts in support of the Deputy Commissioner's compensation order.

With reference to the sole issue that is the subject of review in the present proceeding, namely, whether the employee had, as alleged, suffered an employment related injury which had resulted in his death, witnesess testified in part and in effect as follows:

WILLIE MAE MITCHELL: was the widow of the deceased employee, Herman Mitchell (T. 13[1]); that the deceased had been working regularly although he was known to have high blood pressure and had seen a doctor within a year before his death (T. 19-20).

JACK PHILIP SEGAL, M.D.: That he is a specialist in internal medicine and cardiology, practicing in these fields for approximately 13 years (T. 26); that he examined the employee's death certificate, the hospital records, the coroner's report and the statements of several fellow workers, all pertaining to the deceased's death on November 17, 1966, (T. 27-27A, 38-39; joint exhibits nos. 1 and 2; respondent's exhibits nos 1, 2, and 3); that it was his opinion that there was no relationship between the employee's work and his cerebral illness and subsequent death (T. 29-31, 33-34); that this opinion was based upon the following facts of record; that the employee had appeared at his job as a laborer at 7:30 a.m. on the morning of November 17; that he was performing his usual laboring duties (which on this day consisted of carrying 25 pound cement blocks, two at a time, a distance of approximately 25 feet and then passing them up to brickmasons at work on the building project) when he suffered a cerebral vascular accident secondary to an interacerebral hemorrhage which was the immediate cause of death according to the death certificate; that at the time of his accident, he complained to fellow workers about not feeling well and then suddenly slumped to the floor; that an ambulance was called and took the employee to Casualty Hospital where he was admitted with a pre-

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[1] T. refers to the typewritten transcript of the proceedings before the Deputy Commissioner.

liminary diagnosis of cerebral hemorrhage, cerebral arteriosclerosis; that the Coroner's report gave the cause of death—which occurred 11 hours after he entered the hospital—as cerebral vascular accident secondary to intracerebral hemorrhage and intraventricular hemorrhage; that from the Coroner's examination, the decedent's body showed no signs of trauma; that the employee had suffered from hypertension, and upon his admission to the hospital on November 17, 1966, was recorded as having high blood pressure of 240 over 130; that such pressure represents "severe hypertension" (T. 28-38; 41-44); that it was the further opinion of the witness that since hypertension and high blood pressure could only be aggravated by "severe effort" at work, it is "very unlikely" that such aggravation could conceivably occur from the work the employee had been doing in carrying and passing up blocks to a coworker; that to be aggravated by work the activity would have to be "extremely stressful, strenuous work" which, in the opinion of the witness based upon the facts of this case, the employee was not engaged in (T. 35-37).

Norman H. Horwitz, M.D.: That he is a neurological surgeon, and has practiced that specialty in the Washington, D. C., area since 1956 (T. 45-46); that he has examined the hospital records, the death certificate, Coroner's report, and the several written statements of the deceased's fellow employees pertaining to his cerebral accident and subsequnt death (T. 46-47); that it is the witness' opinion that the cause of death from cerebral hemorrhage was a "spontaneous event related to sclerotic disease in one of the cerebral vessels in association with a background of high blood pressure" (T. 47-48); that this "spontaneous event [was] unrelated to any activity being performed by the individual"; that it is a reasonable probability from the facts of the employee's work on the day in question that the spontaneous cerebral hemorrhage was unrelated to his work (T. 54); that the employee was approximately 47 years of age; that he had died about 8:00 p.m. on November 17, 1966,

from, according to the Coroner's report, a cerebral vascular accident secondary to intracerebral hemorrhage and intraventricular hemorrhage (T. 48-50); that the witness, in rendering his opinion in this case, has "to deal in reasonable medical probabilities" rather than in things that are conceivable since "anything is conceivable"; that from the witness' medical experience, "the reasonable medical probability is . . . that this was a spontaneous event" (T. 53); that the reasonable medical probability here is that the employee suffered a spontaneous cerebral hemorrage which is without relationship to his work (T. 54).

JOHN A. ALGEE, M.D.: a specialist in internal medicine, appellant's own medical expert, when called in an attempt to show a relationship between the employee's death and his work, was unable to testify from any position of reasonable medical probability of the existence of such relationship.

Discussion

It is readily apparent from the evidence outlined above that the Deputy Commissioner in the instant case had ample warrant in the record for his determination that the deceased employee did not sustain an employment related injury and consequent death arising out of and in the course of his employment.

As the Court of Appeals for this Circuit recently stated in *Wolff* v. *Britton, supra:*

> "[The Deputy Commissioner] concluded on a record which supports him that the claim was not compensable. Since "there is factual and legal support for the conclusion, [the judicial] task is at an end". Citing Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 479 (1947).

The judicial function is not to decide the case itself, as we have seen, but, instead, to determine whether there is substantial evidence in the record to support the Deputy

Commissioner's decision of the case. Certainly, it cannot be said that on the record as a whole the Deputy Commissioner in the instant case was "compelled" to reach a conclusion contrary to the one he made. *O'Leary* v. *Brown-Pacific-Maxon, Inc., supra.* Nor can it be said that his holding was "irrational". *O'Keefe* v. *Smith, Hinchman & Grylls, supra.*

In addition, it should be remembered that judicial review of a Deputy Commissioner's rejection of a claim involves a somewhat different viewing of the evidence from review of an award of compensation by him. In the latter case there must be affirmative evidence in the record before the Deputy Commissioner to support the award; in the former, such affirmative evidence is not needed to support the denial of compensation since, upon failure of a claimant to carry the burden of proof in support of his claim, the claim must be rejected by the Deputy Commissioner notwithstanding the absence of affirmative evidence to disprove it. In other words, it is not necessary for the employer to prove a negative. *Gooding* v. *Willard,* 209 F. 2d 913 (C.A. 2, 1954); *Kwasizur* v. *Cardillo,* 175 F. 2d 235 (C.A. 3, 1949), cert. den. 338 U.S. 880. The rejection follows the claimant's failure to establish his claim. In the *Gooding* case, the Court at page 916 said:

> We might let decision turn on the above, but it should also be noted that the burden to show that the accident was a contributing cause of the death was on the appellee. It is obvious, of course, that in point of fact it either was or was not a contributing cause. However, in point of proof of casual connection, the conclusion of the trial judge that the finding of no casual connection was inadequately supported by the evidence leaves the appellee's burden undischarged. The finding of no casual connection went unnecessarily far in positive terms, but whether or not it went unjustifiably far on the evidence it was at least an expression of the determination of the Commissioner that the evidence was short to show affirmatively a casual connection between the accident and the death.

> It is abundantly clear that the evidence on the subject was so conflicting that the Commissioner could reasonably have found that there was no preponderance in favor of the appellee. As no more was needed to support his decision it was error to set it aside.

From the foregoing discussion it is apparent that it cannot be said that the findings made by the Deputy Commissioner in the instant case which caused him to reject the employee's claim were not in accordance with law. *Cardillo* v. *Liberty Mutual Ins. Co., supra.* The fact that a different factual interpretation might have been made by a different trier of the facts does not militate against the findings of the Deputy Commissioner made in this case upon this evidence of record.

If it can be said that there was any conflict in medical testimony offered by the parties, the law is clear that a Deputy Commissioner is not bound to accept the opinion or theory of any particular medical witness or examiner. He may rely upon his own observation and judgment in conjunction with the evidence placed before him. See *Todd Shipyards Corp.* v. *Donovan,* 300 F. 2d 741 (5th Cir., 1962); as with all witnesses, both medical or lay, he can accept all or part and reject all or part of the testimony of any expert witness. With respect to the question of presumption under the law, it should be pointed out that there is no presumption in favor of a claimant arising merely upon his filing of a claim for compensation. He must still produce facts establishing his claim of compensability. It is still the law that the ultimate burden is on him to prove the facts entitling him to an award of compensation, and this burden does not shift. In short, it is not necessary for the employer to prove a negative. *Gooding* v. *Willard,* 209 F. 2d 913 (2nd Cir., 1954); *Kwasizur* v. *Cardillo, supra.*

In line with the foregoing principle, this Court with respect to the presumptions created by the Act in Section 20, stated in *Indemnity Ins. Co. of North America* v. *Hoage,*

61 App. D.C. 173, 58 F. 2d 1074, 1075 (1932), reversed on other grounds, 288 U.S. 162:

> This statutory presumption, however, furnishes merely a basis for proof and not a substitute therefor. It does not shift the burden of proof from the claimant to prove by substantial evidence that the injury arose out of and in the course of his employment . . .

And the Fifth Circuit, speaking only recently on this subject, pointed out in *Young & Co.* v. *Shea,* 397 F. 2d 185, 188 (1968), reh. denied, 404 F. 2d 1059 (1968), cert. denied, May 26, 1969:

> . . . Under 33 U.S.C. § 903(a) [which specifies the basis for Longshoremen's Act liability] the claimant has the burden of proving all that is not presumed under Section 920 [Section 20 of the Act]. See Eschbach v. Contractors, Pacific Naval Air Bases, 7th Cir. 1950, 181 F. 2d 860. Section 920 does not presume an injury so the claimant must prove its existence. Sykes v. O'Hearne, D. Maryland, 1960, 181 F. Supp. 368, 371.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the compensation order complained of is in accordance with law and that the judgment of the District Court should be affirmed.

Respectfully submitted,

M. S. Mazzuchi
405 Investment Building
Washington, D. C. 20005
Attorney for Appellees
Steiner Construction Co., Inc.
Aetna Casualty & Surety Co.

BRIEF FOR THE APPELLEE DEPUTY COMMISSIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,052

WILLIE MAE MITCHELL, APPELLANT

v.

ELMER D. WOODWORTH, Deputy Commissioner, Bureau of Employees' Compensation, U. S. Department of Labor, District of Columbia Compensation District

and

STEINER CONSTRUCTION COMPANY, INC.

and

AETNA CASUALTY AND SURETY COMPANY, APPELLEES

Appeal from the United States District Court for the District of Columbia

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TABLE OF CASES

* Cases chiefly relied upon are marked with an asterisk.

ISSUE PRESENTED

In the opinion of appellee deputy commissioner, the sole issue presented is whether the record, considered as a whole, supports his finding that the employee's death did not result from any employment related injury, but, instead, resulted from physical causes of a nature personal to the employee having no connection with the employment. If the deputy commissioner's finding is supported by the evidence in the record, including the reasonable inferences to be drawn therefrom, then his denial of death benefits to the employee's survivor was correct.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,052

WILLIE MAE MITCHELL, APPELLANT

v.

ELMER D. WOODWORTH, Deputy Commissioner, Bureau of Employees' Compensation, U. S. Department of Labor, District of Columbia Compensation District

and

STEINER CONSTRUCTION COMPANY, INC.

and

AETNA CASUALTY AND SURETY COMPANY, APPELLEES

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR THE APPELLEE DEPUTY COMMISSIONER

COUNTERSTATEMENT OF THE CASE

This cause arose upon an action instituted by appellant, plaintiff below, to review and set aside as not in accordance with law a compensation order filed by Elmer D. Woodworth, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of

Labor, on October 4, 1968, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, and as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D.C. Code 36-501. In that order, the workmen's compensation claim of appellant, Willie Mae Mitchell, filed on behalf of herself as surviving wife of Herman Mitchell, deceased employee, was rejected by the deputy commissioner for the reason that the death of the employee was found not to have been related to the deceased's employment, i.e., death did not arise out of and in the course of that employment.

Following rejection, a complaint was filed in the Court below which, in effect, took issue with the foregoing finding. Thereafter, the deputy commissioner and the intervening defendants, Steiner Construction Company, Inc., and Aetna Casualty and Surety Company filed motions for summary judgment which the Court below granted, dismissing the action. A subsequent application for rehearing filed by plaintiff-appellant was denied. This appeal followed.

SUMMARY OF ARGUMENT

Since the evidence in the record considered as a whole clearly supports the deputy commissioner's factual finding that claimant, appellant herein, had failed to establish that the employee's death was related to his employment, the Court below correctly concluded that this finding was to be accepted upon judicial review. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359 (1965); *Banks* v. *Chicago Grain Trimmers' Ass'n. Inc.*, 390 U.S. 459 (1968), reh. denied, 391 U.S. 929; *Johnson* v. *Massey*, No. 22,103 (decided March 11, 1969), —— U.S. App. D.C. ——, —— F.2d ——; *Foster* v. *Massey*, —— U.S. App. D.C. ——, 407 F.2d 343 (1968); *Wolff* v. *Britton*, 117 U.S. App. D.C. 209, 328 F.2d 181 (1964);

Phoenix Assurance Company v. *Britton*, 110 U.S. App. D.C. 118, 289 F.2d 784 (1961); *Hurley* v. *Lowe*, 83 U.S. App. D.C. 123, 168 F.2d 553 (1948), cert. denied, 334 U.S. 828; *Groom* v. *Cardillo*, 73 App. D.C. 358, 119 F.2d 697, 698 (1941); *General Accident Fire & Life Assurance Corporation* v. *Britton*, 103 U.S. App. D.C. 135, 255 F.2d 544 (1958); *Gooding* v. *Willard*, 209 F.2d 913, 916 (2d Cir. 1954).

ARGUMENT

The deputy commissioner's finding that the employee's death was not related to his employment is supported by the record considered as a whole and is not irrational.

(a) *Scope of Review*

The standard for judicial review in cases arising under the Longshoremen's Act has been carefully delineated by the Supreme Court. If the findings of the deputy commissioner are supported by substantial evidence, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951), or if the deputy commissioner's holding is not irrational, *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359, 363 (1965), or if the order under review is not "forbidden by the law", *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 478 (1947), the decision of the deputy commissioner is to be sustained. The fact that the evidence may permit the drawing of diverse inferences will not warrant disturbing the inference or inferences drawn by the deputy commissioner if his selection is reasonable. *Cardillo* v. *Liberty Mutual Insurance Co.*, *supra*; *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935); *Voehl* v. *Indemnity Ins. Co.*, 288 U.S. 162 (1933).

These principles have found acceptance by this Court in numerous cases under the Longshoremen's Act. *Johnson* v. *Massey*, No. 22,103 (decided March 11, 1969), —— U.S. App. D.C. ——, —— F.2d ——, *Foster* v. *Massey*, —— U.S. App. D.C. ——, 407 F.2d 343 (1968); *Wolff* v. *Britton*, 117 U.S. App. D.C. 209, 328 F.2d 181

(1964). Application of these principles has been made even though the Court, as it said, "might have reached a different conclusion", *Groom* v. *Cardillo*, 73 App. D.C. 358, 119 F.2d 697, 698 (1941), or even in situations where "the Deputy Commissioner was in error as to the legal content of the [statutory] term" involved for consideration on review, *Hurley* v. *Lowe*, 83 U.S. App. D.C. 123, 168 F.2d 553, 556 (1948), cert. denied, 334 U.S. 828. In the latter case, this Court relied upon *Cardillo* v. *Liberty Mutual Insurance Co.*, *supra*, 330 U.S. 469 (1947), wherein the Supreme Court had observed that it was immaterial that a deputy commissioner's finding, based upon an inference, was "more legal than factual."

A review of the record here discloses that the deputy commissioner's determination was properly sustained by the District Court.

(b) *The Evidence*

The record in the instant case consists of the typewritten transcript of the administrative hearing held before the deputy commissioner on May 17, and September 6, 1968, with exhibits. With reference to the sole issue which is the subject of review, namely, whether the employee's death was related to his employment, as alleged, witnesses testified in part and in effect as follows:

WILLIE MAE MITCHELL: That she was the wife of the deceased, Herman Mitchell, at the time of his death on November 17, 1966 (T. 13[1]); that he left for work around 6:30 that morning; that he had been working regularly (T. 14), although he had high blood pressure and had seen a doctor within the year before his death (T. 19-20); that on the above-mentioned date she received a telephone call from Casualty Hospital, informing her that her husband was there and requesting her to come (T. 14-15); that she went to the hospital and saw her husband in the Emergency Room (T. 15-16); that she stayed about an hour and returned that evening

[1] T. refers to the typewritten transcript of the proceedings before the deputy commissioner.

around 7:00 or 8:00 p.m., the time of his death (T. 16-17).

JACK PHILIP SEGAL, M. D.: That he is a specialist in internal medicine and cardiology, practicing in those fields for some 13 years (T. 26); that he had examined the employee's death certificate, his hospital records, the Coroner's report, and the statements of several fellow workers, all pertaining to Mr. Mitchell's death on November 17, 1966 (T. 27-27A, 38-39; Joint Exhibits Nos. 1 and 2; Respondent's Exhibits Nos. 1, 2, and 3); that it was the witness' opinion that *there was no relationship between the employee's work and his cerebral illness and subsequent death* (T. 29-31, 33-34); that this opinion was based upon the following facts of record: that the employee had appeared at his job as a laborer at 7:30 a.m. on the morning of November 17; that he was performing his usual laboring duties (which on this day consisted of carrying 25 pound cement blocks, two at a time, a distance of approximately 25 feet and then passing them up to brickmasons at work on the building project) when he suffered a cerebral vascular accident secondary to an intracerebral hemorrhage which was the immediate cause of death according to the death certificate; that at the time of his accident, he complained to fellow workers about not feeling well and then suddenly slumped to the floor; that an ambulance was called and took the employee to Casualty Hospital where he was admitted with a preliminary diagnosis of cerebral hemorrhage, cerebral arteriosclerosis; that the Coroner's report gave the cause of death—which occurred 11 hours after he entered the hospital—as cerebral vascular accident secondary to intracerebral hemorrhage and intraventricular hemorrhage; that from the Coroner's examination, decedent's body showed no signs of trauma; that the employee had suffered from hypertension, and upon his admission to the hospital on November 17, 1966, was recorded as having blood pressure of 240 over 130; that such pressure represents "severe hypertension" (T. 28-38; 41-44); that it was the further opinion of the wit-

ness that since hypertension and high blood pressure could only be aggravated by "*severe* effort" at work, *it is "very unlikely" that such aggravation could conceivably occur from the work the employee had been doing in carrying and passing up blocks to a co-worker*; that to be aggravated by work the activity would have to be "*extremely* stressful, *strenuous* work" which, in the opinion of the witness based upon the facts of this case, *the employee was not engaged in* (T. 35-37).

NORMAN H. HORWITZ, M. D.: That he is a neurological surgeon, and has practiced that specialty in the Washington, D. C., area since 1956 (T. 45-46); that he has examined the hospital records, the death certificate, Coroner's report, and the several written statements of the deceased's fellow employees pertaining to his cerebral accident and subsequent death (T. 46-47); that it is the witness' opinion that the cause of death from cerebral hemorrhage was a "*spontaneous* event related to sclerotic disease in one of the cerebral vessels in association with a background of high blood pressure" (T. 47-48); *that this "spontaneous event [was] unrelated to any activity being performed by the individual"*; that it is a reasonable probability from the facts of the employee's work on the day in question that *the spontaneous cerebral hemorrhage was unrelated to his work* (T. 54); that the employee was approximately 47 years of age; that he had died about 8:00 p.m. on November 17, 1966, from, according to the Coroner's report, a cerebral vascular accident secondary to intracerebral hemorrhage and intraventricular hemorrhage (T. 48-50); that the witness, in rendering his opinion in this case, has "to deal in reasonable medical probabilities" rather than in things that are conceivable since "anything is conceivable"; that from the witness' medical experience, *"the reasonable medical probability is . . . that this was a spontaneous event"* (T. 53); *that the reasonable medical probability here is that the employee suffered a spontaneous cerebral hemorrhage which is without relationship to his work* (T. 54).

Appellant's own medical expert, when called in an attempt to show a relationship between the employee's death and his work, was unable to testify from any position of reasonable medical probability of the existence of such relationship. Thus, DR. JOHN A. ALGEE, a specialist in internal medicine, testified on behalf of appellant as follows: That he has practiced privately in the District of Columbia since November 1965 (T. 99); that in September 1966 he had examined and treated the employee at the Union Clinic for hypertension and sinus congestion (T. 97, 100-101); *that decedent's hypertensive condition dated back to 1955* when his blood pressure ranged between 170 over 100 and 240 over 130 (T. 97-98); that upon the basis of the exhibits in this case, the witness *could "not say categorically" that the employee's death was work related*; that in the witness' mind, "a question exists" on this matter (T. 102); that the employee's collapse was "undoubtedly a quick catastrophic event that happened very suddenly" and *was "not necessarily" related to his work* (T. 102-103); that (with respect to such relationship) the witness "cannot say" that "this is so or is not so"; that all he can say is that "it is a possibility" which is fraught with uncertainty, however (T. 103, 105); that cerebral vascular accidents are generally spontaneous (T. 106-107); that hypertension in the employee, coupled with his elevated blood pressure upon his admission to the hospital and the pathologist's finding of hemorrhage with rupture into the ventricular system, is consistent with spontaneous hemorrhage because of high blood pressure; that there was nothing which the witness observed from the record to indicate that the employee was engaged in any particularly strenuous activity or anything out of the ordinary for him (T. 107); that the witness would "not really" characterize the employee's carrying of a 25 pound block in each hand as a strenuous activity for a laborer (T. 108); *that to elevate the employee's blood pressure "transiently" he would have to have been "hurrying" for a "sustained period of time"*; that it takes "*extremes* of

exercises" or "*over* exertion" of a "strenuous kind" to elevate blood pressure (T. 109); that *the witness, however, found no evidence of such a "rapid nature" in this record* (T. 110).

(c) *Discussion*

The deputy commissioner's task in the instant case, as trier of the facts, was to decide from the evidence in the record, and the inferences to be drawn therefrom, whether the employee's death from cerebral vascular accident, secondary to intraventricular and intracerebral hemorrhage, was causally related to his employment or, instead, to causes unconnected therewith. If the latter, no compensation is payable since, to be compensable, the death must be one "arising out of and in the course of employment".

It is readily apparent from the evidence heretofore outlined that the deputy commissioner in the instant case had ample warrant in the record for his determination that there was no causal relationship between the work of the employee—either as an original force or as an aggravating or accelerating one—and the employee's death resulting from a cerebral incident. The record contains undisputed medical testimony that the employee was suffering from a vascular illness long before his death. There was medical testimony, based upon reasonable probability, that this illness was one having a natural progression which could—and did in fact—culminate in a "spontaneous" manifestation of its fatal presence. The medical evidence, including that of appellant's own expert, showed that vascular impairment of the type the employee had can create death "spontaneously" without any effect from work or its environment. The cause of death, in other words, is of ideopathic origin; that is, it is self-originated. There was here clear and unambiguous medical testimony that in view of the inherent nature of the employee's vascular condition, death was neither work-originated nor work-aggravated by reason of the working environment or the working activities. Under

such circumstances, with unequivocal medical evidence being present here, the recent case of *Wheatley* v. *Adler*, 132 U.S. App. D.C. 178, 407 F.2d 307 (1968), is readily distinguishable; for there the working environment, namely, cold temperature, had acted upon the employee's physical weakness to help produce his fatal heart attack. In the case at hand, there was medical testimony which unambiguously showed that nothing the employee had done for his employer on the day of his death had contributed to his fatal cerebral impairment.

With respect to any conflict in the medical testimony offered by the parties, a deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. He may rely upon his own observation and judgment in conjunction with the evidence. *Todd Shipyards Corp.* v. *Donovan*, 300 F.2d 741 (5th Cir., 1962); *Hampton Roads Stevedoring Corp.* v. *O'Hearne*, 184 F.2d 76 (4th Cir., 1958); *Contractors PNAB* v. *Pillsbury*, 150 F.2d 310 (9th Cir., 1945); *Crescent Wharf & Warehouse Co.* v. *Cyr*, 200 F.2d 633 (9th Cir., 1952); *Baltimore & O. R. Co.* v. *Clark*, 56 F.2d 212 (Md. 1932); *Jarka Corporation of Philadelphia* v. *Norton*, 56 F.2d 287 (Pa. 1930); *Liberty Stevedoring Co.* v. *Cardillo*, 18 F.Supp. 729 (N.Y. 1937); *Zurich General Accident & Liability Ins. Co., Ltd.* v. *Marshall*, 42 F.2d 1010 (Wash. 1930); *Ryan Stevedoring Co.* v. *Norton*, 50 F.Supp. 221 (Pa. 1943); *Liberty Mutual Ins. Co.* v. *Marshall*, 57 F.Supp. 177 (Wash. 1944), aff'd 151 F.2d 1007 (9th Cir., 1945); *Marine Operators* v. *Barnhouse*, 61 F.Supp. 572 (Ill. 1944); cf. *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959). As with all witnesses, both medical or lay, he can accept part and reject part of the testimony of an expert witness. *Banks* v. *Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968), reh. denied, 391 U.S. 929.

While workmen's compensation laws will be liberally construed, it should be noted (despite the presumption of Section 20(a) of the Longshoremen's Act, 33 U.S.C. 920(a), that a "claim" comes within the Act), that a

claimant is still required to show to the deputy commissioner's satisfaction the existence of facts supportive of his application for compensation. There is no presumption in favor of a claimant arising merely from his filing of a claim. *Hines* v. *Pacific Mills*, 214 S.C. 125, 51 S.E. 2d 383 (1940). He must still produce facts establishing his claim of compensability. It is still the law that the *ultimate* burden[2] is on him to prove the facts entitling him to an award of compensation, and this burden does not shift. In short, it is not necessary for the employer to prove a negative. *Gooding* v. *Willard*, 209 F.2d 913 (2nd Cir., 1954); *Kwasizur* v. *Cardillo*, 175 F.2d 235 (3rd Cir., 1949). The rejection follows the claimant's failure to establish his claim. In the *Gooding* case, it was aptly said:

> We might let decision turn on the above, but it should also be noted that *the burden to show that the accident was a contributing cause of the death was on the appellee.* It is obvious, of course, that in point of fact it either was or was not a contributing cause. However, in point of proof of causal connection, *the conclusion of the trial judge that the finding of no causal connection was inadequately supported by the evidence leaves the appellee's burden undischarged.* The finding of no causal connection went unnecessarily far in positive terms, but whether or not it went unjustifiably far on the evidence it was at least an expression of the determination of the Commissioner that the evidence was short to show affirmatively a causal connection between the accident and the death. It is abundantly clear that the evidence on the subject was so conflicting that the Commissioner could reasonably have found that there was no preponderance in favor of the appellee. As no more was needed to support his decision it was error to set it aside. (Emphasis supplied.)

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[2] As distinguished from the mere proof necessary to overcome any prima facie case arising from Section 20(a), *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935).

In line with the foregoing principle, this Court, with respect to the presumptions created by the Act in Section 20, stated in *Indemnity Ins. Co. of North America* v. *Hoage*, 61 App. D.C. 173, 58 F.2d 1074, 1075 (1932), reversed on other grounds, 288 U.S. 162:

> This statutory presumption, however, furnishes merely a basis for proof and *not a substitute* therefor. It does not shift the burden of proof from the *claimant* to prove by substantial evidence that the injury arose out of and in the course of his employment. . . . (Emphasis supplied.)

And the Fifth Circuit, speaking only recently on this subject, pointed out in *Young & Co.* v. *Shea*, 397 F.2d 185, 188 (1968), reh. denied, 404 F.2d 1059 (1968), cert. denied, May 26, 1969:

> . . . Under 33 U.S.C. § 903(a) [which specifies the bases for Longshoremen's Act liability] the *claimant* has the burden of proving all that is not presumed under Section 920 [Section 20 of the Act]. See Eschbach v. Contractors, Pacific Naval Air Bases, 7th Cir. 1950, 181 F.2d 860. *Section 920 does not presume an injury so the claimant must prove its existence.* Sykes v. O'Hearne, D. Maryland, 1960, 181 F.Supp. 368, 371. (Emphasis supplied.)

For this reason, judicial review of a rejection of a claim, as here, involves a somewhat different viewing of the evidence from review of an award of compensation. In the latter case, there must be affirmative evidence in the record to support the award; in the former, affirmative evidence is not needed to support the denial of compensation since, upon failure of a claimant to carry his burden of proof in support of his claim, the claim must be rejected notwithstanding the absence of affirmative evidence to disprove the claim. The rejection follows the claimant's failure to establish his claim by maintaining the ultimate burden that is his. *Gooding* v. *Willard*, *supra*, 209 F.2d 913 (2nd Cir., 1954); *Kwasizur* v. *Cardillo*, *supra*, 175 F.2d 235 (3rd Cir., 1949).

The judicial function is not for the Court to decide the case for itself,[3] as we have heretofore seen, but rather to determine whether there is substantial evidence in the record that will support the decision reached by the deputy commissioner. In the instant case, there was certainly sufficient legal basis, predicated upon the evidence in the record, together with the inferences reasonably to be drawn therefrom, to support the deputy commissioner's conclusion that the employee's death was not causally related to his employment. Certainly, it cannot be said that on the record as a whole the deputy commissioner was "compelled" to reach a conclusion contrary to the one he made, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), that his conclusion was "contrary to law", *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947), or that his holding was "irrational", *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359 (1965).

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[3] See *Groom* v. *Cardillo, supra*, 73 App. D.C. 358, 119 F.2d 697, 698 (1941); *Hurley* v. *Lowe, supra*, 83 U.S. App. D.C. 123, 168 F.2d 553 (1948), cert. denied, 334 U.S. 828; *Wolff* v. *Britton, supra*, 117 U.S. App. D.C. 209, 328 F.2d 181 (1964); *Foster* v. *Massey, supra*, —— U.S. App. D.C. ——, 407 F.2d 343 (1968); *Johnson* v. *Massey, supra*, No. 22,103 (decided March 11, 1969), —— U.S. App. D.C. ——, —— F. 2d ——.

CONCLUSION

In view of the above, it is respectfully submitted that the compensation order complained of is in accordance with law, and that the judgment of the Court below sustaining it was proper and should be affirmed.

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